Nos. 13-354, 13-356

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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KATHLEEN SEBELIUS, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents,

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third Circuit and Tenth Circuits

BRIEF OF *AMICUS CURIAE* 9 ACADEMIC INSTITUTIONS AND 27 COMPARATIVE LAW AND RELIGION SCHOLARS IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* on behalf of the institutions and individuals listed in the appendix is respectfully submitted pursuant to Supreme Court Rule 37.[1] The institutions listed are each distinguished academic organizations that specialize in law and religion. They and the individuals—prominent academic experts in international and comparative law—have joined to share their broad international experience concerning the collective aspects of religious freedom and the role that for-profit organizations play in advancing these freedoms.

SUMMARY OF THE ARGUMENT

In our corporate age, the right to freedom of religion is vital not only in the lives of individuals, but in expressions of that freedom in community with others both in religious entities and in non-profit organizations (as acknowledged by the government, *Hobby Lobby* Pet. Br. 17-19) and additionally, as here, in for-profit corporations. There is no principle of corporate life that requires founders or owners of corporations to sacrifice their human rights in order to make use of the corporate form, and nothing that prevents them from embodying (indeed, *incorporating*) religious beliefs in the for-profit vehicles of modern corporate life. All businesses reflect the substantive goals and commitments of their owners and managers, and it is wrong to deprive religiously grounded convictions of free exercise protections under RFRA merely because they have been given corporate form.

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[1] Pursant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *amici* affirm that no counsel for a party authored the brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to this brief.

To the contrary, collective religious rights may be exercised not only through the formation of familiar associations such as churches, synagogues, mosques, but also in countless other organizations and communal structures, such as hospitals, schools, universities, orphanages, residences for the elderly, and other bodies that further religious life and religious altruism. These vital institutions can and do take both nonprofit and for-profit forms, and there is nothing about that organizational choice that should limit eligibility for freedom of religion protections. Indeed, such a limit would run counter to the trend in many jurisdictions in the United States and Europe, which are currently expanding their corporate law to make room for "hybrid" social enterprise entities such as benefit corporations, flexible-purpose corporations, and other entities that combine for-profit form with a commitment to some form of social beneficial purpose.

Religious activity often extends to types of collective action that go beyond the nonprofit sector: for example, religious bookstores, religious publishing houses, media outlets, and cemeteries. Religious organizations may also generate unrelated business income internally, or may carry out commercial activities through separately incorporated entities. Kosher and halal food companies typically operate for a profit, but serve religious needs. Islamic banks operate for profit but follow strict religious rules that forbid charging interest. Religious doctors may organize a for-profit clinic to fulfil religiously-felt obligations to serve others. In sum, religious beliefs practiced collectively may naturally require modern corporate forms, including for-profit ones. Religious rights do not evaporate the moment profit motive is added to the exercise of religious beliefs.

These realities are reflected in widely accepted norms at the international, regional, and national levels. Decisions by foreign and international tribunals reinforce the principle that government should not require collective religious rights to be checked at the gate before entering the for-profit world. The requirements of ethos organizations—both religious and secular—are widely recognized and are consistently granted exemptions from otherwise applicable laws. But the principle is broader: a corporation's eligibility for religious freedom protections turns not on status as a for-profit or non-profit corporation, but on commitment to convictions that fall within the ambit of religious freedom rights. As borne out by international experience, corporations holding such convictions need and deserve protections if full religious freedom is to be achieved in society.

Of course it is true that corporations have a separate legal existence. But the Government draws an extreme conclusion from this fact, arguing that this means there is "no basis on which to impute the individual-respondents' religious beliefs to the corporate respondents." *Hobby Lobby* Pet. Br. 25. This misrepresents the significance of separate corporate legal existence. The point is not to prevent corporations from having views or commitments (including moral or religious commitments) "imputed" to them. How else could a corporation get its values and priorities, if not from its owners and managers? Rather, the corporate form provides a mechanism for shielding owners from personal liability for the debts and obligations of the corporation—a mechanism designed to encourage entrepreneurship and risk-taking. To say that the beliefs of owners must not be "imputed" to corporations makes no sense.

Separation for liability purposes does not require separation for all purposes. In particular, corporate entities should not be stripped of all dimensions of religious conviction, and walled off from freedom of religion protections. The Government's claims to the contrary are belied not only by international precedent, but also by the overwhelming domestic and foreign commitment to principles of corporate social responsibility and corporate conscience. Even though they "use labor to make a profit" (*Hobby Lobby* Pet. Br. at 19), businesses worldwide are expected to concern themselves with their impact on the environment, social justice, or a wide range of issues of moral significance. Just as Coca-Cola may have a corporate conscience focused on saving polar bears, Hobby Lobby, Conestoga Woods, and Mardel may have a corporate conscience attuned to saving the lives of unborn children.

The doctrine of the corporate veil was intended to liberate corporate enterprise, not to hobble religion in the commercial sector. The Government's argument has a "heads we win, tails you lose" quality, arguing on the one hand that the RFRA rights of the owners of the corporations are not violated because it is only their businesses (and not they) that are subject to the contraceptive mandate, but contending on the other hand that the businesses do not have any free exercise rights, because they are separate legal entities, impervious to the convictions of their owners. In fact, restrictions on collective expression of religion by for-profit corporations substantially burden the free exercise rights of both corporations and owners.

ARGUMENT

I. International Norms and Tribunals Repeatedly Recognize that Religious Freedom has a Collective Dimension

a. International Agreements Protect Collective Aspects of Religious Freedom

International norms emphasize a collective dimension of religious freedom rights. According to the Universal Declaration of Human Rights,

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone *or in community with others* and *in public or private*, to manifest his religion or belief in teaching, practice, worship and observance.[2]

Parallel language was incorporated in the International Covenant on Civil and Political Rights, to which the US is a party.[3]

International norms that address religious rights more concretely consistently recognize the importance of legal entities to the practice of religion. Article 6 of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief provides that "the right to freedom of thought, conscience, religion or belief shall include" a variety of freedoms, including the right "to establish and maintain places [of worship or assembly], to "establish and maintain appropriate charitable or

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[2] Universal Declaration of Human Rights, Art. 18 (emphasis added).

[3] International Covenant on Civil and Political Rights ("ICCPR"), Art. 18(1), ratified by the United States with no reservations to Article 18, 138 Cong. Rec. S4781-01 (daily ed., 2 April1992).

humanitarian institutions," to "make, acquire and use . . . articles and materials related to the rites or customs of a religion or belief;" to "disseminate relevant publications," to "solicit and receive voluntary financial and other contributions from individuals and institutions;' and so forth.[4] In contemporary legal settings, it is difficult if not impossible to carry out these functions without using corporate forms.

Similarly, in the commitments of the Organization for Security and Cooperation in Europe ("OSCE"), a number of the institutional prerequisites for religious life are spelled out. Particularly salient are Principles 16c and 16d of the 1989 Vienna Concluding Document, which provide that participating States in the OSCE will grant appropriate legal entity status to religious communities and will respect the autonomy of those communities.[5]

International norms, then, provide significant protection of the right of religious communities, in the interest of religious freedom and beyond protection of individual conscience, to form entities with autonomy to carry out their distinctive religious affairs.

b. National Courts and International Tribunals Protect the Collective Aspects of Religious Freedom

Numerous foreign courts and international tribunals have also recognized the collective aspects of

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[4] Proclaimed by UN General Assembly Resolution 36/55 (25 November 1981).

[5] Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Principle 16, adopted in Vienna on 17 January 1989.

religious freedom.[6] The Grand Chamber of the European Court of Human Rights ("ECtHR") recently

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[6] *See, e.g., Serif v. Greece*, No. 38178/97 (ECtHR, 1999); *Hasan and Chaush v. Bulgaria*, No. 30985/96 (ECtHR, 2000); *Obst v. Germany*, No. 425/03 (ECtHR, 2010); *Siebenhaar v. Germany*, No. 18136/02 (ECtHR, 2011); *Schüth v. Germany*, No. 1620/03 (ECtHR, 2010); *Supreme Holy Council of the Muslim Community v. Bulgaria*, No. 39023/97 (ECtHR, 2004); *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria*, Nos. 412/03 and 35677/04 (ECtHR, 2009); *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc. CCPR/C/39/D/ 195/1985 (1990); 28 March 2003, V ZR (Fed.Ct.Just.)(Germ.) 261/02; *NGK in Afrika (OVS) v. Verenigde Geref. Kerk in Suider-Afrika* 1999 (2)SA 156 (SCA)(S.Afr.) (holding that congregation of a particular church had consistently been treated by the courts as distinct juridical persons); *New Testament Church of God v. Stewart* [2008] ICR 282 (UK); *The Gay and Lesbian Clergy Anti-Discrimination Society Inc v. Bishop of Auckland* [2013] NZHRRT 36 (N.Zealand); Czech Republic Const., Arts. 15(1), 16(2); Danish Const. (1953), Art. 67; Germany Basic Law, Art. 140, incorporating Art. 137 of the Weimar Constitution; Italy Const., Arts. 7 & 8; Poland Const. (1997), Art. 25.3; Portugal Law on Religious Freedom 16/2001, Art. 15 §1; Spain Const., Art. 16, 29 December 1978, and 1980 Organic Law on Religious Freedom, Art. 6.1; James Casey, *Ireland*, 87, 89; Gianni Long, *Italy*, 319; Jiří Rajmund Tretera, *Czech Republic*, 633, 640-641, in CHURCH AUTONOMY: A COMPARATIVE STUDY (Gerhard Robbers ed., 2001); Lev Simkin, *Church and State in Russia*, in LAW AND RELIGION RELIGION IN POST-COMMUNIST EUROPE, 261, 275 (Silvio Ferrari et al. eds., 2003); Richard Puza, *Austria*, 57; Gerhard Robbers, *Germany*, 121, 122; Balázs Schanda, *Hungary*, 541, 548-549; Ingvill Thorson Plesner, *Norway*, 467; Peter Roudik, *Russian Federation*, 505, in LEGAL POSITION OF CHURCHES AND CHURCH AUTONOMY (Scripta Canonica 3)(Hildegard Warnink ed., 2001); Anthony Bradney, *United Kingdom*, 737, 741; Sophie van Bijsterveld, *Netherlands*, 524, 530-531; Carmen Garcimartín, *Ireland*, 403, 411-412; Záboj Horák, *Czech Republic*, 251, 258; Francis Lyall, *Scotland*, 593, 594; Merilin Kiviorg, *Estonia*, 261, 265; Matti Kotiranta, *Finland*, 273, 287; Jan Velaers & Marie-Claire Foblets, *Belgium*, 103, 117, in RELIGION AND THE SECULAR STATE: INTERIM REPORTS (Javier

noted: "religious communities traditionally and universally exist in the form of organised structures . . . . Were the organisational life of the community not protected by Article 9 [on religious freedom], all other aspects of the individual's freedom of religion would become vulnerable."[7]

That Court has repeatedly held that "the right of believers to freedom of religion [which] includes the right to manifest one's religion in community with others . . . . is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords."[8] Legal structures are a means of protecting "the right to manifest one's religion, especially for a religious community, in its collective dimension. . . . ."[9]

The European Commission of Human Rights ("ECmHR," a precursor to the ECtHR) has upheld organizational rights beyond those of religious communities *per se*. In *Rommelfanger v. Germany*, the Commission upheld a German decision permitting a Catholic hospital to fire an employee who spoke out

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Martínez-Torrón & W. Cole Durham, Jr. eds., 2010); Ringolds Balodis, *Latvia*, 253, 270-271; Brigitte Basdevant-Gaudemet, *France*, 157, 174-176; Lars Friedner, *Sweden*, 537, 547; Jolanta Kuznecoviene, *Lithuania*, 283, 292-293; David McClean, *United Kingdom*, 553, 568-570; Michaela Moravčíková, *Slovak Republic*, 491, 508-509; Alexis Pauly, *Luxembourg*, 305, 315-318; Balázs Schanda, *Hungary*, 323, 336-337, in STATE AND CHURCH IN THE EUROPEAN UNION (Gerhard Robbers ed., 1995).

[7] *Sindicatul "Păstorul cel Bun" v. Romania*, No. 2330/09 (ECtHR Grand Chamber, 2013) §136.

[8] *Metropolitan Orthodox Church of Bessarabia*, No. 45701/99 (ECtHR, 2001) §118.

[9] *Id.* §118.

against Catholic teachings.[10] The Commission has also characterized Article 9 religious freedom rights as having a more collective nature than other rights under the European Convention on Human Rights ("ECHR").[11]

II. Foreign Courts and Legislation Protect For-Profit Corporate Entities' Exercise of Religion

a. Numerous Courts Have Recognized That For-Profit Entities have Fundamental Rights

Numerous courts have rejected the challenge that human rights should be limited to natural persons. In South Africa, the Constitutional Court declined to rule that the term "everyone" in section 8(4) of the constitution's statement that "everyone shall enjoy all universally accepted fundamental rights and freedoms" was limited to natural persons. The court explained:

> It was argued that . . . by extending the rights to juristic persons, the rights of natural persons are thereby diminished. We cannot accept the premise: many 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons . . . .
>
> The objectors were also concerned that affording rights to powerful and wealthy corporations would result in detriment to individual rights, given that powerful corporations have greater resources to enforce their rights through litigation. But the

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[10] No. 12242/86 (ECmHR, 1989).

[11] *Church of Scientology of Paris v. France*, No. 19509/1995 (ECmHR, 1995).

> same could be said of powerful and wealthy individuals. Moreover, the objection wrongly equates juristic persons with powerful and wealthy corporations. In South Africa there are countless small companies and close corporations that need and deserve protection no less than do natural persons.[12]

The Italian Court of Cassazione has stated that juridical persons have fundamental rights,[13] relying on Article 2 of the Italian Constitution: "The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed." When personal rights rooted in the Constitution have been violated, "such damages are indemnifiable also when such violation has been suffered by a juridical person or a collective juridical person, as long as this violation is equivalent to a right that is retained by a human person and does not presuppose a human nature to exist."[14]

The German Constitutional Court, interpreting Article 19 section 3 of Germany's Basic Law, which grants fundamental rights to "domestic legal persons to the extent that the nature of such rights permits," has held that rights holders include for-profit corporations.[15] The Dutch Constitution similarly bestows

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[12] *Ex Parte Chairperson of the Constitutional Assembly* (6 September 1996)(Const'l Ct.)(S.Afr.), para. 57-58.

[13] Private law section, decision no. 12929 (4 June 2007)(Ct. of Cass.III)(Italy); Private law section, decision no. 7145 (29 March 2006)(Ct. of Cass. I)(Italy).

[14] *Id.*, para. 1.6.

[15] BVerfGE 38, 281, 303 (1974); MICHAEL SACHS, ED., GRUNDGESETZ, KOMMENTAR (5th ed. 2009), Art. 9 n.7.

"rights and claims also on corporate bodies and on groups and organizations without corporate status in so far as to do so can be meaningful with regard to the nature of the relevant basic right."[16] The British Court of Appeal upheld a corporate right to avoid self-incrimination, despite the fact that "a company cannot suffer all the pains to which a real person is subject."[17] The Supreme Court of Canada has also repeatedly recognized that corporations may claim human rights.[18]

Even the UN Human Rights Committee and American Commission on Human Rights, institutions that generally recognize only claims by individuals,[19] have permitted organizational rights to be vindicated in a few cases.[20] In *Singer v. Canada*, the Human Rights Committee rejected Canada's claim that case should be dismissed because the harm suffered was to free expression rights of the corporate entity.[21] Similarly, the American Commission determined that:

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[16] TK, 1975-1976, 13872(3) 11 (explanatory statement attached to revised version of Dutch Constitution).

[17] *Triplex Safety Glass Co., Ltd. v. Lancegaye Safety Glass (1934), Ltd.* [1939] 2KB 395, 409 (Ct.Appeal)(UK).

[18] *Quebec v. Irwin Toy Ltd.* [1989] 1 S.C.R. 927 (S.Ct.)(Canada); *Ford v. Quebec* [1988] 2 S.C.R. 712, 766-67 (S.Ct.)(Canada).

[19] In contrast to the situation in the US and Europe, the explicit language and *travaux préparatoires* of the instruments creating these bodies imposed limitations on the protection of non-physical persons. *See* Marius Emberland, *The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights*, 4 HUM. RTS. L.REV. 261 (2004).

[20] *Id.* at 257-275.

[21] (455/1991), Admissibility Decision, CCPR/C/51/D/344/1994 (1994); 2 IHRR 148 (1995)(identifying the rights of the owner and business).

> although the figure of legal entities has not been expressly recognized by the American Convention . . . this does not mean that, in specific circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law.[22]

In response to the challenge that human rights should be reserved for humans, it is significant that international human rights documents use the terms "human rights" and "fundamental freedoms" interchangeably.[23] For example, the full name of the ECHR,—the treaty interpreted by the ECtHR —is the "European Convention for the Protection of Human Rights and Fundamental Freedoms."[24]

The ECtHR has repeatedly held that corporations may invoke many of the rights protected by the ECHR,[25] and a significant though not unduly

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[22] OC-85/2001, *Cantos v. Argentina*, IACtHR Series C 85 (2001), 26-9.

[23] EMBERLAND, THE HUMAN RIGHTS OF COMPANIES, 27 (2006).

[24] European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into Force 3 September 1953.

[25] *See supra* note 6. The European Court has distinguished between rights that have exclusively individualistic aspects, such as Article 3's prohibition against torture and the right of non-religious conscience under Article 9, which do not adhere to corporations, and those provisions, such as Article 9's protection of religion or the procedural guarantees under Articles 6(1) and 13, which corporations can claim. *See, e.g.*, *Verein 'Kontakt-Information-Therapie' and Hagen v. Austria*, No. 11921/86 (ECmHR, 1988) §1(4)(organizations may not claim non-religious conscience under Article 9); *Agrotexim Hellas SA and Others v. Greece*, No. 14807/89 (ECtHR, 1995) §62 (corporations can claim

burdensome number have done so. Between 1998 and 2003, for example, 3.8% of ECtHR cases directly concerned corporate litigation.[26]

International commentators support the logic of courts' application of human rights to corporations. In response to the common argument that corporations are not human actors and are not the intended beneficiaries of human rights protection, they argue that "legal doctrine and practice are not also so literal"[27]: "corporations are comprised of, run by, and operate for the benefit of, human actors. There seems to be no prima facie reason why corporations should not be able to claim human rights protections where the benefits will be passed on or felt by the human actors associated with those corporations."[28] Commentators also argue that corporations are "recognized as legal subjects for many purposes and . . . are significant participants in social, economic and political life. If they bear these hallmarks of citizenship then why should they be denied other protections afforded to citizens, such as human rights?"[29] Moreover, reciprocity suggests that granting corporations human rights gives corporations a stake in the human rights regime

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procedural guarantees under Articles 6(1) and 13); *supra* notes 8-11 and *infra* notes 36-42 (discussion about the Court's Article 9 for-profit jurisprudence).

[26] EMBERLAND, THE HUMAN RIGHTS OF COMPANIES, 13-14.

[27] Michael K. Addo, *The Corporation as a Victim of Human Rights Violation*, in MICHAEL K. ADDO, ED., HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 193 (1999).

[28] Stephen Bottomley, *Corporations and Human Rights*, in STEPHEN BOTTOMLEY AND DAVID KINLEY, EDS., COMMERCIAL LAW AND HUMAN RIGHTS 47 (2002).

[29] *Id.*

and "sharpen[s] the claim that corporations owe human rights responsibilities to others."[30]

b. Foreign Courts Permit Commercial Entities to Claim Religious Rights

In addition to upholding the right of for-profit corporations to claim fundamental rights generally, some foreign courts have held that for-profit or commercial corporations may claim religious rights. Cases directly on point are not numerous, and many such decisions are comparatively recent.[31] The ECtHR and ECmHR demonstrate the evolving thinking on for-profit-corporations and religious rights.

In 1968, the ECmHR seemed to foreclose the possibility that any kind of organization could bring religious claims. In *Church of X v. the United Kingdom,* the Commission held that a corporation incorporated for religious and educational purposes could not claim rights under Article 9 because it was not a natural person.[32] In 1979, in *X and Church of Scientology v. Sweden,* however, the Commission reversed its holding on organizations as religious rights-bearers, stating that it was "now of the opinion that the above distinction [*in Church of X*] between the church and its members is essentially artificial . . . . It should, therefore, be accepted that a church body is

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[30] *Id.* at 62.

[31] *See, e.g.*, 2 BvR 208/76 (25 March 1980)(Const'l Ct.)(Germany); *Kustannus Oy Vapaa Ajattelija AB and Others v. Finland,* No. 20471/92 (ECmHR, 1996); 2C_71/2010 (22 September 2010) (Fed.Ct.)(Switz.).

[32] No. 3798/68 (ECmHR, 1968). The Court suggested that it an Article 9 claim could be brought by or on behalf of the individual members of the church, but rejected it in this case because no members had been named.

capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members."[33]

The Commission's thinking on for-profit corporations continued to evolve. At first, in a summary opinion in *Company X. v. Switzerland,* a case in which a LLC printing company objected to paying ecclesiastical taxes, the Commission appeared to explicitly reject without any discussion the possibility that for-profit corporations can enjoy religious freedom rights.[34] In 1979, in *X and Church of Scientology v. Sweden,* the Commission also considered that a claim about commercial advertisements offering religious objects for sale should properly fall under Article 10 (freedom of expression) rather than Article 9 (religious freedom).[35]

By1996, however, the Commission was more willing to consider religious rights of for-profit corporations. In *Kustannus Oy Vapaa Ajattelija AB and Others v. Finland,* an LLC publishing company maintained by the Freethinker's Association sought relief from ecclesiastical taxes levied by the state for the dominant religious traditions.[36] The Commission referred to the *Company X* holding, but then explained that under Article 9,

> the general right to freedom of religion includes, inter alia, freedom to manifest a religion or 'belief' either alone or 'in community with others' whether in public or in private. The Commission

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[33] No. 7805/77 (ECmHR, 1979) §2.

[34] No. 7865/77 (ECmHR, 1979).

[35] *X and Church of Scientology* §§4-5.

[36] No. 20471/92 (ECmHR, 1996).

> would therefore not exclude that the applicant association is in principle capable of possessing and exercising rights under Article 9 para. 1.[37]

However, "in the circumstances of the present case," in which the LLC challenged its tax liability, "the applicant company cannot rely on the rights referred to in Article 9 para. 1." [38]

Since *Kustannus*, a religious freedom claim by a for-profit corporation has not been squarely presented to the ECtHR. In 2000, however, the Court held that an association, found by French courts to be "essentially commercial," could bring an Article 9 religious freedom claim.[39] A Jewish association, which provided kosher meat for sale in twenty butcher's shops, nine restaurants, and five caterers in the Paris region alone and had more than eighty outlets for the sale of deep-frozen food, challenged the French limitations on its ability to certify ritual slaughter as kosher.[40] In a split Grand Chamber decision, the Court held that the French limitations on the association's ability to certify ritual slaughter were proportionate and did not unduly interfere with the association's Article 9 rights.[41] Seven of the seventeen judges dissented,

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[37] *Kustannus* §1(b) (iii).

[38] Cf. *Hein v. Freedom From Religion Foundation*, 551 US 587 (2007)(taxpayers cannot challenge constitutionality of expenditures ordered by the executive branch); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 US 464 (1981)(taxpayers cannot challenge conveyance of property to church-related entities).

[39] *Cha'are Shalom Ve Tsedek v. France,* No. 27417/95 (ECtHR Grand Chamber, 2000) §§38-39, 69.

[40] *Id.*, esp. §§27, 39.

[41] *Id.*, §§80-88.

arguing that the limitations were discriminatory and violated the association's Article 9 rights.[42] But importantly, neither the majority nor the dissenters questioned the association's right to bring a religious freedom claim because of its commercial character.

Germany's Federal Constitutional Court held that "there are no doubts" that a limited-liability company that operated a religious hospital open to all could exercise religious freedom rights.[43] "Since by their goal and intended objects as an association or company [the LLC and other plaintiffs] are dedicated to the care of the sick in a religious and charitable form, it is also possible for the state, by sovereign act, to violate their fundamental right of free practice of religion . . . . The freedom to profess a religious belief comprises both the freedom of the individual . . . and also, necessarily, the freedom to form associations for the purpose of collective public profession of belief . . ."[44] The Court exempted the LLC from government regulation, holding that, even though it involved laypeople in the administration, it "shares in the realization of a part of the mandate of the church in the spirit of Christian piety, in harmony with the professed belief of the Christian church."[45] The Court emphasized that under the religious self-understanding of the corporate

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[42] *Id.*, Joint Dissenting Opinion.

[43] 2 BvR 208/76 (25 March 1980)(Const'l Ct.)(Germany), English translation in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY 182, 190 (1980). Note that the Constitutional Court has distinguished non-religious conscience rights, which it has held do not apply to corporations. 1 BvR 1013/89 (18 October 1989)(Const'l Ct.)(Germany). *Cf. supra*, note 25.

[44] DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, 191.

[45] *Id.* at 194.

owners and corporate charter, "the practice of religion encompasses not only the sphere of faith and of religious service, but also the freedom to develop and be effective in the world, as its religious and social task requires."[46] The Constitutional Court also upheld religious freedom rights in the commercial context of a Muslim butcher.[47]

Switzerland's Federal Court, while generally limiting for-profit corporations' religious claims for tax relief,[48] has also upheld religious tax relief claims:[49]

> Although legal persons in general and profit-making entities in particular cannot rely on the right to freedom of religion and conscience in the context of taxation, it would be by all means absurd—notwithstanding formal logic—to impose upon a legal person with religious or church stated purposes ecclesiastical taxes intended for churches of different denominations.[50]

While cases explicitly dealing with the question of religious rights of for-profit entities are fairly limited,

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[46] *Id.*

[47] 1BvR 1783/99 (15 January 2002)(Const'l Ct.)(Germany) (upholding religious freedom and employment rights of Muslim butcher to exemptions from animal protection laws).

[48] *i.S. Model AG gegen Steuerverwaltung und Verwaltungsgericht des Kantons Thurgau,* BGE 126 I 122 (13 June 2000) (Fed.Ct.) (Switz.).

[49] 2C_71/2010 (22 September 2010)(Fed.Ct.)(Switz.).

[50] *i.S. Buchdruckerei Elgg AG,* 102 I 468 (6 October 1976) (Fed.Ct.)(Switz.), 477; *see also i.S. Neuapostolische Kirche in der Schweiz,* BGE 95 I 350 (9 July 1969)(Fed.Ct.)(Switz.)(holding that religious organization can challenge imposition of church taxes because of the disproportionate effect on the members' religious freedom rights).

a number of national courts have simply upheld commercial actors' religious freedom rights without engaging in discussions of the entities' corporate structuring. The Court of Appeals of Paris, for example, has held that companies may require employees to comply with their ideological or religious orientation—for example, the Court recently held that a day-care facility, as an *entreprise de conviction,*[51] could require employees to reflect its beliefs by not wearing ostentatious religious symbols.[52] Indeed, the Court has gone so far as to *require* organizations holding themselves out as religiously based to accommodate religious employees' needs: a Jewish kosher restaurant was required to deviate from the legal standard to meet Jewish law because it held itself out as Jewish and the contract reflected "an equal commitment of the parties to the Jewish law."[53]

The Spanish Constitutional Court, in addressing the rights of a private religious hospital, stated that the right to have an ethos is not exclusive of educational institutions, and other companies or associations may have such ethos. In the absence of specific legislation, there cannot be an *a priori* limitation on the type of companies or institutions that may have an ethos with an external dimension.[54] That Court also upheld the right of employees to leave media organizations without adverse legal consequences when the

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[51] See *infra* note 72-81.

[52] *Laaouej c. Association Baby-Loup*, S 13/02981 (27 November 2013)(C.A. Paris)(France).

[53] *Brami c. Arbib*, D. 1990 (25 May 1990)(C.A. Paris)(France), 596.

[54] STC 106/1996 (12 June 1996)(Const'l Ct.)(Spain)(Catholic hospital); see also text accompanying notes 72-73 *infra*. (ethos rights of schools under Spanish law).

employer changes its "ideological orientation."[55] The Italian Constitutional Court similarly permitted religious universities and schools to fire employees that go against their values and ideological connotations.[56]

c. Foreign Constitutional and Legislative Norms Support For-Profit Entities' Religious Claims

In numerous civil law countries, legislation is more dispositive of the nature of constitutional rights than court cases. [57] Moreover, in many countries, the legislative branch has the ultimate say in matters of constitutional interpretation, as in the UK and the Netherlands. [58]

Given this, it is particularly significant that major legislation in many of these countries protects corporate conscientious objection rights, particularly in health care contexts. The UK National Health Service "contracts-out" medical services to independent

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[55] STC 225/2002(9 December 2002)(Const'l Ct.)(Spain).

[56] Decision no. 195 (29 December 1972)(Const'l Ct.)(Italy)

[57] JOHN HENRY MERRYMAN AND ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed. 2007), 136. *See* SOURENDRA PANDEY, ENCYCLOPEDIA OF WORLD LEGAL, JUDICIAL AND COURT SYSTEMS (2009), 3.

[58] *See, e.g.*, Const., Art. 120 (Netherlands)(banning judicial review of constitutional questions); Gustavo Fernandez de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. PA. J. CONST'L L. 977, 978 (May 2001),; Sophie van Bijsterveld, *Human Rights and Private Corporations: A Dutch Legal Perspective*, 6 ELECTRONIC J. COMP. L. 4 (2002).

legal entities, including for-profit ones.[59] Regulations provide that these contractors (including for-profit), may assert conscientious objection to provision of contraceptive and other medical and counseling services.[60] Italy likewise does not require any private hospitals or clinics to perform abortions, regardless of for-profit or nonprofit status.[61]

Argentine law also contains extensive conscience-based exemptions for for-profit and other medical service providers, which may conscientiously object to the state requirement to provide contraceptives at no cost.[62] The federal administrative regulation implementing this law extends the bases for conscientious objection by private health centers: objecting institutions may not only invoke "reasons of belief" to opt out of complying with the law, but also "institutional purposes" or "the convictions of their proprietors."[63] In Buenos Aires, the provincial Minister of Health has accepted a publicly-held corporation that owns clinics as a conscientious objector under these regulations.[64]

Argentine for-profit entities may also conscientiously object to the national requirement to carry out sterilizations.[65] Schools, including for-profit ones, may

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[59] National Health Service (General Medical Services Contracts) Regulations 2004/291 (UK), Reg. 4.

[60] *Id.*, para. 7.

[61] Law no. 194, 22 May 1978 (Italy), Art. 8.

[62] Ley (Federal) No. 25.673 (Arg.).

[63] Decreto 1282/2003 (Arg.).

[64] Resolución 4405/08 (Minister of Health, Province of Buenos Aires)(2008)(Arg.).

[65] Ley 26.130 (2006)(Arg.).

also have conscientious objections: they are permitted to follow the government plan for sex education "within the framework of their convictions"[66] and to create an institutional plan "within the framework of respect for its institutional ideals and for the convictions of its members."[67]

The Council of Europe, which oversees the implementation of the ECHR, has similarly resolved that "[n]o person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason."[68]

Amici are not opposed to introduction of healthcare measures (which all *amici* acknowledge as an important interest), but emphasize that comparative law suggests this can and should be done in ways that protect religious freedom and moral conscience. The Government's suggestion that the Affordable Care Act provisions at issue are the least restrictive means to advance the state's interests is belied by international practice.

Legislation in civil law countries and rules promulgated by international organizations illustrate a shared constitutional-level expectation of protection for conscience in commercial settings.[69] The European

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[66] Ley (Federal) No. 25.673 (2006)(Arg.).

[67] Ley (Federal) No. 26.150 (2006)(Arg.).

[68] Parliamentary Assembly of The Council of Europe, Resolution 1763 (7 October 2010).

[69] *See, e.g.*, Concluding Statement, Latin American Consortium for Religious Liberty (21 August 2013)("The financial motives of

Union (EU) and The Council of Europe, for example, accommodate national-level protections for religious objectors to animal rights laws in the case of Islamic *halal* or Jewish *kosher* requirements.[70] The ECtHR has recognized that such exemptions under national laws give "practical effect to a positive undertaking on the State's part intended to ensure effective respect for freedom of religion."[71]

Legislation in European countries also recognizes religious freedom protections for ethos-based commercial organizations, like the court decisions mentioned above. Spanish law permits private schools, which may be for-profits or nonprofits, to define their own

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a corporation should not be an absolute barrier for an organization contemplating an ideological objection. For-profit companies are created, directed and conducted by human beings who exercise human rights inherent in human dignity – both collective and individual rights. To restrict the rights of corporate entities is to restrict the rights of individuals who are identifiable and possess an identity defined by religion and ideology, making it possible to lift the corporate veil and protect those individuals from the State.")(statement of more than 30 Latin American law and religion academics).

[70] The European Convention for the Protection of Animals for Slaughter (10 May 1979)(Council of Europe), Art. 12-13, 17; Directive on stunning of animals before slaughter, 74/577/EEC (18 November 1974)(EU).

[71] *Cha'are Shalom Ve Tsedek, supra* note 39, §76.

ethos, which can include religious and moral principles.[72] All members of the school community—teachers, staff, students, and students' parents—are obliged to respect the school's ethos.[73]

Dutch law protects "the freedom of an organization or association founded on religious or ideological principles to impose requirements, which, having regard to its purpose, are necessary to actualize its foundation."[74] Organizations founded on religious or ideological principles may discriminate in employment decisions[75] and membership.[76]

German and French laws and legal practice provide for the right of employers to claim status as a "tendency organization" or business with a religious "affinity", *i.e.*, an organization with a religious or ideological dimension.[77] Germany also recognizes corporate religious exemptions in its major legislation on business co-determination, which provides employees a role in firm governance.[78] In France, "the rights and

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[72] Ley Orgánica 2/2006, 3 May 2006, de Educación, Art. 115 (Spain); see also JAVIER MARTÍNEZ-TORRÓN, RELIGION AND LAW IN SPAIN (2014), paras. 534-37

[73] Ley Orgánica 2/2006, 3 May 2006, de Educación, Art. 84.3 (Spain); RELIGION AND LAW IN SPAIN, paras. 536-537.

[74] Equal Treatment Law §6a(2)(a)(Nether.).

[75] *Id.* §§5(1)(a), 6a(2)(a).

[76] *Id.* §6a(2)(a).

[77] *See supra* notes 51-56 (comparable cases); Isabelle Riassetto, *Droit de travail – Enterprise de tendance,* in FRANCIS MESSNER, ED., DICTIONNAIRE DE DROIT DES RELIGIONS (2010), 215-16; The French Court of Appeal has also applied this to an organization focused on a non-religious belief. *See supra* note 52.

[78] BetrVG §118 (Germany)(exempting *Tendenzbetriebe*); MitbestG § 1, Abs. 4 (Germany)(exempting "religious communities

specific obligation of an employee of an enterprise with religious goals are correlated with the rights and obligations of the employer . . . . [T]he liberty of both parties must be understood within the requirements of the ideological framework of the employer."[79] The EU has also recognized this concept in its definition of an "ethos-based" organization,[80] granting them protections and flexibility in employment discrimination contexts.[81]

III. International Trends Emphasize For-Profit Entities' Corporate Conscience

International experience underscores the importance of corporate conscience in for-profit entities. The Government's portrayal of for-profit entities as ineligible for RFRA protection[82] because "they use labor *to make a profit*, rather than to perpetuate a religious values-based mission"[83] demeans business corporations and is flatly inconsistent with the widespread modern insistence on corporate social responsibility. The Government's approach suggests that corporations should not be concerned with moral

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and their charitable and educational facilities, regardless of their legal form").

[79] DALLOZ RECEUIL, Note, 1990, 596 (France)(citing JEAN RIVERO AND JEAN SAVATIER, DROIT DU TRAVAIL (9th ed. 1984), 194.

[80] Directive 2000/78/CE (27 November 2000)(EU).

[81] Directive 2000/78/CE (27 November 2000)(EU); Riassetto, *Droit de travail – Enterprise de tendance.*

[82] Religious Freedom Restoration Act of 1993 in *Hobby Lobby* Pet. Brief at 19.

[83] *Id.*, *citing* 733 F.3d 1208, 1242 (D.C. Cir. 2013)(Edwards, J., concurring in part and dissenting in part), petition for cert. pending, No. 13-567 (filed 5 November 2013).

or conscientious principles, but should limit themselves to securing profits for the corporation's shareholders.

Governments and international norms, in contrast, strongly encourage exercise of corporate conscience. Though structured as distinct legal entities, corporations are not merely a limited liability shell, but regularly – indeed inevitably – reflect the beliefs and moral commitments of their owners or founders.[84] Rigorous exclusion of religious freedom from the commercial corporate sphere would substantially burden RFRA free exercise rights of those organizations that seek to assert religious claims. The result would be a significant weakening of the structures that undergird corporate social responsibility and pluralism in society.

a. International Actors and Norms Stress the Importance and Breadth of Corporate Conscience

The United Nations encourages corporate conscience through the UN Global Compact, particularly in the areas of human rights, labor, the environment, and anti-corruption.[85] The Compact's first two principles call upon businesses to "respect the protection of internationally proclaimed human rights" and "make sure that they are not complicit in human rights abuses."[86] In this regard, the Compact relies on international standards articulated in key human rights

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[84] *See, e.g.*, Ben & Jerry's Corporate Social Responsibility (attributing corporate social attitudes to their founding partners), http://bjsocialresponsibility.weebly.com/.

[85] *See* http://www.unglobalcompact.org/.

[86] *See* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

instruments such as the UDHR and multilateral human rights treaties.[87]

In 2011, the UN Human Rights Council unanimously endorsed a set of Guiding Principles on Business and Human Rights, which further explain that businesses, like Hobby Lobby, Conestoga Woods, and Mardel, must both "avoid causing or contributing to adverse human rights impacts through their own activities" and "[s]eek to prevent or mitigate impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[88] These international norms mandate, rather than forbid, for-profit businesses to consider the moral and human rights implications of their actions.

The International Organization for Standardization (ISO) creates definitive international business management standards,[89] which explain that corporate

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[87] *See* UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATION'S 'PROTECT, RESPECT AND REMEDY' FRAMEWORK HR/PUB/22/04 (2011), 14, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[88] *See* UN Global Compact and UN Office of the High Commissioner for Human Rights, *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments*, 14 (July 2011)(emphasizing that "[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions. Depending on circumstances, business enterprises may need to consider additional standards.")

[89] Int'l Org. for Standardization, *Discovering ISO 26000* (2010), 2; *Schematic Overview of ISO* 2600, http://www.iso.org/iso/sr_schematic-overview.pdf; *see also* lists of codes at http://www.business-humanrights.org/Categories/Principles.

social conscience is an integral part of business, noting that "[a]n organization's performance in relation to the society in which it operates and to its impact on the environment has become a critical part of measuring its overall performance and its ability to continue operating effectively."[90] Respect for human rights is a core subject of social responsibility, the ISO explains, and "an organization may face stakeholder expectations that it go beyond respect, or it may want to go further and contribute to the fulfillment of human rights";[91] "an organization should seek to integrate social responsibility throughout its decisions and activities."[92]

Contrary to the Government's view, corporate conscience is a standard feature of transnational corporations. In its annual international survey of corporate social responsibility, KPMG noted that 93% of the 250 largest companies in the world report on their corporate responsibility activities.[93] Of the 100 largest companies in 34 countries, 71% of publicly traded companies conduct corporate social responsibility reporting.[94] In the United States, 86% of companies report on corporate responsibility.[95] According to the

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[90] Int'l Org. for Standardization, *Discovering ISO 26000* (2010), 2.

[91] ISO 2600 §6.3.2.2; *see* Human Rights Council, United Nations General Assembly, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, 14th Session §4 ¶¶ 62-63 (2010), http://198.170.85.29/Ruggie-report-2010.pdf.

[92] Int'l Org. for Standardization, *Discovering ISO 26000* (2010), 8.

[93] KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2013, 10.

[94] *Id.* at 21.

[95] *Id.* at 25.

2013 KPMG report, "CR reporting appears to be standard business practice the world over."[96]

Corporate conscience is essential for contemporary businesses:[97] "Many business leaders embrace corporate social responsibility as a moral imperative and expect that a company will use its economic and political power in a socially responsible way by reducing any negative impact of corporate activities on society."[98] Some argue the inevitability of corporate conscience because a corporation's profitability and productivity are so closely tied with social approval and support:

> These simply are the facts of life for a corporation, whether it does business only in a small town in Indiana, or whether it has operations all over the world . . . [T]he obvious conclusion [is] that a 'corporate conscience' must exist whether or not it is explained to the company's employees in credos. Whatever moves the company to action, be it a Management Committee, Executive Committee, Board of Directors or even the CEO alone, there is a conscience of the corporation which of necessity must dictate ethical standards for the good of

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[96] *Id.* at 10.

[97] *See, e.g.*, CENTER FOR ETHICAL BUSINESS CULTURE, CORPORATE SOCIAL RESPONSIBILITY: THE SHAPE OF A HISTORY, 1945-2004 (2010)(listing a "preliminary bibliography" of over 250 works); *see also* CAROLE BASRI, INTERNATIONAL CORPORATE PRACTICE (October 2013 update) §7.1.1.

[98] Z. Jill Barclift, *Corporate Social Responsibility and Financial Institutions: Beyond Dodd-Frank*, 31 NO. 1 BANKING & FIN. SERVICES POL'Y REP. 13, 15 (2012).

society. It may not stem from a 'do good' mentality but more out of necessity. But it does exist.[99]

b. There is Broad Legal Support for Exercises of Corporate Conscience

Legal systems the world over recognize and protect the importance of corporate conscience in a broad array of circumstances. The EU has made this the centerpiece of multi-year policies,[100] leading to creation of multistakeholder platforms in a number of relevant industrial sectors and monitoring of the commitments of large European corporations to take account of international corporate responsibility principles.[101]

Many countries and stock exchanges have introduced requirements for reporting on corporate conscience or have created reporting guides. A survey of 45 countries identified 134 mandatory policies relating to corporate responsibility and 53 more voluntary policies.[102] The US requires such disclosures under the Securities & Exchange Commission[103] and the Dodd-

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[99] Alfred S. Farha, *The Corporate Conscience and Environmental Issues: Responsibility of the Multinational Corporation*, 10 NORTHWESTERN J. INT'L L. & BUS. 382 (1990).

[100] *See* European Commission, *Promoting a European Framework for Corporate Social Responsibility* COM (2001) 366 (2001); European Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* COM (2006) 136 (2006); European Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 (2011).

[101] *A Renewed EU Strategy 2011-14*.

[102] KPMG et al., *Carrots and Sticks: Sustainability reporting policies worldwide* (2013).

[103] 15 USC §§77a-77aa (2006).

Frank Act.[104] By executive order, US federal agencies must report on corporate responsibility performance.[105] Sustainability reporting is a required listing requirement in a number of stock exchanges, including Brazil, China, Malaysia, and South Africa.[106] India's Companies Act requires companies to establish a Board Committee on Corporate Social Responsibility, invest at least 2% of net profits on socially responsible projects, and produce an annual report.[107] Large companies are required by to report annually on corporate conscience issues in France, Norway, and Denmark, and UK requires reports from both large and medium-sized companies.[108]

Courts and legislatures actively facilitate many forms of corporate social conscience. The UK High Court held that a trust may be invested in accordance with the moral aims of its objects.[109] In the United States, virtually all states have permissive statutes that allow corporations to give to charity even when

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[104] Dodd-Frank Wall Street Reform and Consumer Protection Act §1502, 124 Stat. 2213 (2010)(codified as amended at 15 USC §78m(p)(2012)).

[105] Executive Order 13514, 74 Fed. Reg. 52117 (8 October 2009)

[106] KPMG INTERNATIONAL SURVEY.

[107] Companies Bill, 2012 (India), cl.135.

[108] Article L 512-17 of the Environmental Code (France); Norwegian Accounting Act (as amended in 2013), http://lovdata.no/dokument/LTI/forskrift/2013-12-19-1680; Danish Commerce & Companies Agency, Reporting on Corporate Social Responsibility (2009)(requiring large companies to report or explain why they do not); Companies Act, 1985, c. 6 §235(3), sched. 7 (UK).

[109] *Harries v. Church Commissioners for England* [1992] 1 WLR 1241, 1244-47 (trustees could invest according to "non-financial considerations deduced from Christian morality").

this does not benefit the corporation.[110] Even prior to the existence of state corporate philanthropy laws, the New Jersey Supreme Court rejected a shareholder's suit challenging a company's decision to donate to Princeton University,[111] reasoning that as the nation's wealth has shifted into corporate hands, citizens have reasonably "turned to corporations to assume the modern obligations of good citizenship in the same manner as humans do."[112]

The US federal government also fosters corporate conscience: corporations may deduct up to 10% of their taxable income for charitable contributions, and do not require a business purpose for the contribution.[113] It has established numerous programs that permit for-profit organizations to obtain federal grants for charitable activities.[114] These grants support, *e.g.*, early childhood education,[115] rehabilitation of youthful offenders,[116] supplemental education services,[117] job

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[110] *See* R. Frank Balotti and James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW 965 (May 1999)(citing statutes).

[111] *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 98 A.2d 581 (1953).

[112] *Id.*

[113] 26 USC §170(b)(2)(2013).

[114] *See* White House Faith-Based and Community Initiatives: Federal Funds for Organizations that Help Those in Need (2002), http://www.in.gov/ofbci/files/GrantsCatalog.pdf.

[115] *Id.* (Headstart grants).

[116] *Id.* (Responsible Reintegration of Youthful Offender project grants).

[117] *Id.* (Supplemental Education Services grants).

training,[118] rural rental housing loans,[119] testing strategies for individuals with limited English proficiency,[120] National Institute of Health grants,[121] and rural hospitals and clinics.[122]

c. Corporate Conscience and Business Practices May Include Religious, Spiritual, and Moral Elements

Given the broad protection for corporate conscience generally, singling out religious and moral exercises of corporate conscience for non-protection not only runs counter to the thrust of RFRA, but constitutes outright discrimination against businesses like Hobby Lobby, Mardel, and Conestoga Wood that include religious, spiritual, and moral elements in their corporate conscience. Just as Coca-Cola might express particular interest in protecting polar bears,[123] other corporations, such as Hobby Lobby, may be concerned with protecting the lives of unborn children. As noted by a Dutch government report on corporate social

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[118] *Id.* (High-Growth Job Training Initiative Grants for the Healthcare and Biotechnology Industries)

[119] *Id.* (Guaranteed Rural Rental Housing Loans)

[120] *Id.* (Grant Funds to Test Innovative Training Strategies for Individuals with Limited English Proficiency and Hispanic Americans).

[121] National Institute of Health Grants Policy Statement: Grants to For-Profit Organizations (October 2012), http://grants.nih.gov/grants/policy/nihgps_2012/nihgps_ch18.htm#_Toc271265300.

[122] US HHS, Health Resources and Services Administration, Rural Health Grants, available at http://www.hrsa.gov/ rural health/grants/.

[123] *Protecting the Polar Bear*, www.cocacola.co.uk/environment/arctic-home/protecting-the-polar-bear.html.

responsibility, the choice of goals for expressing corporate conscience may be "dictated by idealism and the personal opinions of the entrepreneur as regards what is ethical, . . . [by respect] for the natural environment [or by] . . . a deeper need for meaning, for spirituality."[124] Many jurisdictions have added new "hybrid" corporate forms such as benefit corporations and flexible-purpose corporations that explicitly allow social enterprises to have a commitment to other social values alongside its profit-making goals.[125]

Moral and religious convictions have long been a part of attitudes towards business[126] and efforts to encourage responsible exercise of corporate conscience.[127] Religious British Abolitionists brought a successful boycott of sugar grown in the West Indies using slave labor, contributing to British abolition of the slave trade in 1807.[128] Religious principles led to

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[124] SER CORPORATE SOCIAL RESPONSIBILITY: A DUTCH APPROACH 31-31(2005).

[125] *See generally*, Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639 (2013).

[126] *See, e.g.*, MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1930), 19 (professional activities as a "calling" or "duty"); ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893), 407 (work as a "duty"); Simon B. Brooks, *CSR and the Straight-Jacket of Economic Rationality*, 30 INT'L J. SOCIOL. & SOC. POLICY 11/12 (2010).

[127] See generally Brooks, *id.* at 606; Nicholas Eberstadt, *What History Tells Us about Corporate Responsibility*, 7 BUS. & SOC. REV. 76-81 (1973).

[128] *See, e.g.*, Clare Midgley, *Slave Sugar Boycotts, Female Activism and the Domestic Base of British Anti-Slavery Culture*, 17 SLAVERY AND ABOLITION 137-162 (1996); Lawrence B. Glickman, *Abolition and the Origins of American Consumer Activism*, 56 AM. QUART. 889-912 (2004).

commercial philanthropy and provision of social services during the Industrial Revolution.[129] Moral convictions fueled the movement to disinvest in corporations that did business in apartheid South Africa in the 1980s.[130] As indicated by the "whole field of study and practice around organisational culture, and mission and value statements, . . . the idea of finding meaning and value in our work is still with us."[131]

The trend of "workplace spirituality," or seeking to live faith and spiritual values in the workplace, began in the 1920s and has become increasingly more prominent.[132] By the late 1990s, the Academy of Management had formed a group on management, spirituality, and religion.[133] Research has correlated workplace spirituality with greater employee engagement, creativity, authenticity, meaningful work, and emotional stability.[134] RFRA protections need to be

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[129] SER CORPORATE SOCIAL RESPONSIBILITY: A DUTCH APPROACH 24-26 (2005); PATRICK MACLAGAN, MANAGEMENT AND MORALITY (1998).

[130] *See, e.g., Harries v. Church Commissioners for England* [1992] 1 WLR 1241; William H. Kaempfer et al., *Divestment, Investment Sanctions, and Disinvestment: An Evaluation of Anti-Apartheid Policy Instruments* , 41 INT'L ORG. 457-473 (1987).

[131] Brooks, *CSR and the Straight-Jacket of Economic Rationality,* 609 (citation omitted).

[132] *See, e.g., Companies Hit the Road Less Traveled: Can Spirituality Enlighten the Bottom Line?* BUS. WEEK, (5 June 2002); GILBERT FAIRHOLM, CAPTURING THE HEART OF LEADERSHIP: SPIRITUAL COMMUNITY IN THE NEW AMERICAN WORKPLACE (1997); JAY CONGER, SPIRIT AT WORK: DISCOVERING THE SPIRITUALITY IN LEADERSHIP (1994).

[133] *See* Academy of Management Management, Spirituality, and Religion Interest Group, http://group.aomonline.org/msr/.

[134] Margaret Benefiel, *The Second Half of the Journey: Spiritual Leadership for our Organizational Transformation,* 16

available to protect the continuing role of religion in modern business life.

CONCLUSION

For the foregoing reasons, the decision below in *Hobby Lobby* should be affirmed and the decision below in *Conestoga Woods* should be reversed.

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APPENDIX

APPENDIX

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The following institutions and prominent academic experts have joined in the submission of this brief:

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